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2014 IL App (3d) 130211-U

Order filed February 10, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

| | | |
|--------------------------|---|-------------------------------|
| <i>In re</i> MARRIAGE OF |) | Appeal from the Circuit Court |
| |) | of the 14th Judicial Circuit, |
| DAVID B. HARKEY, |) | Rock Island County, Illinois. |
| |) | |
| Petitioner-Appellant, |) | |
| |) | |
| and |) | Appeal No. 3-13-0211 |
| |) | Circuit No. 11-D-320 |
| LINDA L. HARKEY, |) | |
| |) | |
| Respondent-Appellee. |) | Honorable Lori Lefstein, |
| |) | Jude, Presiding. |

JUSTICE SCHMIDT delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court's distribution of marital property, including its valuation and allocation of respondent's pension, did not constitute an abuse of discretion.
- ¶ 2 On December 6, 2012, the circuit court of Rock Island County entered a judgment of dissolution of the marriage between petitioner, David Harkey, and respondent, Linda Harkey.
- ¶ 3 Prior to trial, the parties presented three contested issues per a pretrial memorandum: (1) maintenance and whether petitioner should contribute to respondent's health insurance

premiums; (2) the allocation of the parties' retirement accounts; and (3) allocation of the parties' checking accounts.

¶ 4 Following the hearing, the trial court denied respondent's requests for maintenance and contributions to her health insurance premiums, awarded each party their individual retirement accounts/pensions, and ordered an unequal distribution of the parties' checking accounts favoring petitioner.

¶ 5 Petitioner filed a motion to reconsider, objecting to the valuation of the respondent's pension and requesting the court reconsider its failure to divide any portion of that pension. The trial court denied the motion.

¶ 6 Petitioner appeals, claiming the trial court abused its discretion in valuing respondent's pension and in failing to award him any portion of said pension.

¶ 7 We affirm.

¶ 8 **BACKGROUND**

¶ 9 The parties were married in May of 1981. In December of 2009, the parties separated when petitioner left the family home. He returned in an attempt to reconcile, but ultimately left the home for good in May of 2010. He filed for divorce on June 10, 2011.

¶ 10 Petitioner is 64 years of age and currently employed at the Rock Island Arsenal as a supply specialist. He began work there in 2006, and his salary has increased over time. He currently makes \$53,000 gross per year. Petitioner is not subject to a mandatory retirement age, and stated at trial that he had no immediate plans to retire. One of the benefits of his employment with the Department of Defense includes participation in the Federal Employees Retirement System (FERS), as well as health insurance. FERS is a defined benefit plan in which he is fully vested. Health insurance costs petitioner \$123 per pay period. Petitioner contributes

regularly both to FERS and to a Thrift Savings Plan (TSP), which is a second retirement plan made available to him through his employer. As of December 31, 2010, petitioner had accumulated \$19,185.32 in his TSP account, and had continued to contribute to it regularly during the parties' separation.

¶ 11 Prior to his employment at Rock Island Arsenal, petitioner worked at The Hartford starting in 1976 and continuing for approximately 10 years. He now receives a modest retirement benefit from this employment, totaling \$1,442 per year (payable in equal monthly installments). Petitioner's work history following his time at The Hartford was "pretty spotty" until he accepted the job with his current employer. Many of petitioner's jobs were part-time or minimum wage jobs. His employment income during those years (1986 to 2007) was typically less than \$10,000 per year. Petitioner holds a Bachelor of Science degree in agricultural economics from Western Illinois University.

¶ 12 Respondent is 59 years of age and currently retired after teaching for 35 years. During her last 20 years, respondent taught second grade at Jane Adams School in Moline, Illinois. Respondent earned her bachelor's degree in elementary education at Western Illinois University, and went on to earn a master's degree from the same institution in 1996. She also acquired 30 additional hours of postgraduate work following her masters. Throughout the course of her full-time employment, respondent provided health insurance coverage for the family. Respondent was also continuously contributing to the Teachers Retirement System (TRS) through payroll withholding. A statement dated November 12, 2010, shows the amount of refund of member contributions in respondent's TRS account as \$130,034.24.

¶ 13 After discussion between the parties as to respondent's retirement options, they agreed that respondent would retire at the end of the 2011-2012 academic year. Respondent therefore

tendered a letter to the Moline School District on July 28, 2008, indicating her intent to retire. The school district requires a four-year notice, which is irrevocable. Respondent testified that she and petitioner understood the decision to retire would be irrevocable once notice was given.

¶ 14 Respondent testified that she would not have elected to retire if she had known in 2008 that she might not receive the whole TRS benefit she had earned through her 35 years as a teacher. She further stated that she would not have given intent of her notice to retire had she known her husband planned on filing for divorce.

¶ 15 As of the date of the hearing, respondent was living off her savings. Following her retirement, she became responsible for the cost of her own health insurance coverage, which was \$417.58 per month at the time of trial. Respondent has chosen not to draw her TRS pension benefit yet, as doing so would prevent her from any continued or new employment as a teacher within the state of Illinois. According to respondent, she has elected not to receive those benefits because she is unsure what her financial situation will be when the parties' divorce is over. Respondent testified that it is difficult for her to obtain employment within a new school district given her age, experience, and educational background. School districts would have to pay her much more than a first-year teacher based on her credentials, thus the schools tend to fill those positions with new teachers at a lesser rate of pay. A TRS recipient may, however, serve as a substitute teacher for up to 100 days per year at \$90 per day. Doing so would limit respondent's teaching income to \$9,000 annually (plus the pension benefit), and would preclude her from any full-time teaching position.

¶ 16 Petitioner testified that he would like a 50/50 split on the respondent's benefits once she begins drawing her pension. He stated he had no problem with respondent receiving an interest in his pension plans once he retired. While his TSP was valued at \$19,185.32 as of December

31, 2010, petitioner provided no value for his FERS plan. There is also petitioner's modest pension of \$120 per month from The Hartford. Petitioner also testified to respondent's role as the family's "bread winner," and that respondent had made greater financial contribution to the parties' marriage. From her earnings, respondent paid most of the household expenses, while petitioner used his money to pay his personal expenses.

¶ 17 The parties submitted financial disclosure statements. Respondent indicated her monthly expenses were \$2,792.80, though that figure did not consider any extraordinary expenses that may arise. Respondent testified on cross-examination that if she elected to place her pension in pay status, her monthly benefit would be \$5,582. However, if petitioner received one-half of her pension, her monthly gross income would be \$2,700. Petitioner reported net income of \$3,237 (even after funding FERS and TSP contributions, which he continued to do even after the parties' separation). Petitioner's income exceeded his expenses by approximately \$900 each month.

¶ 18 At the commencement of the hearing on September 12, 2012, the parties provided to the trial court their joint pretrial memorandum. The memorandum outlined disputed matters for the court's resolution, as well as other issues which the parties resolved by agreement. The parties stipulated that their savings accounts would be divided equally. They also stipulated to a corrected value for respondent's TRS contributions of \$130,034.24. Halfway through trial, the parties indicated to the court that all remaining issues had been pared down to three main issues: (1) maintenance, with a related issue concerning the cost of respondent's health insurance coverage; (2) allocation of the parties' retirement accounts; and (3) allocation of the parties' checking accounts.

¶ 19 At the close of evidence, the trial court discussed the basis for its ruling in open court and considered the application of the statutory factors outlined in section 503 of the Illinois Marriage

and Dissolution of Marriage Act (the Act) (750 ILCS 5/503 (West 2010)). The court found that respondent was the major wage earner over the course of the parties' long-term marriage, but there was no evidence that petitioner "was willfully sitting at home not working." As for their respective contributions to the family unit, the court found that while both parties were involved in raising their daughter, respondent did play a greater role.

¶ 20 The court found the most complicated factor to be the relevant economic circumstances of each spouse at the time of the dissolution of marriage. Petitioner was earning more than \$50,000 per year, while respondent was "in a very complicated financial situation because of her irrevocable decision to retire in 2008." While the court noted that petitioner had every right to seek a divorce, the timing had placed respondent in a precarious financial situation that warranted a disproportionate property award. The court concluded that under the circumstances, it was more appropriate to award respondent the entirety of her pension as opposed to a maintenance award. Doing so would end any financial obligations and entanglements between the parties in the future, unlike a maintenance award.

¶ 21 As for the parties' checking account, the court ruled that because petitioner would receive less retirement assets than respondent, the amounts accumulated by respondent in her checking account during the parties' separation would be divided between the parties in equal shares (\$17,308.58 each). The court further confirmed that petitioner would receive all of the retirement assets held in his own name, including his FERS benefit, his TSP benefit and his Hartford pension. The judgment of dissolution memorializing these terms was entered on December 6, 2012.

¶ 22 Petitioner filed a motion to reconsider on January 3, 2013. He alleged therein that the trial court erroneously valued respondent's TRS pension and failed to equitably allocate the

parties' retirement assets. At the hearing, petitioner's counsel conceded an error in the motion and acknowledged that the trial court had used the proper figure for respondent's pension (\$130,034.24). As to the broader question of proper allocation of the retirement assets, the trial court concluded the case had been properly decided and denied petitioner's motion.

¶ 23 This timely appeal followed.

¶ 24 ANALYSIS

¶ 25 Petitioner's sole argument on appeal is that the trial court erred in valuing respondent's pension through TRS, leading to an inequitable allocation of marital assets.

¶ 26 Any interest in a pension, whether mature, vested, nonvested, qualified or nonqualified, is property within the meaning of section 503 of the Act (750 ILCS 5/503 (West 2010)). Pensions, however, are inherently difficult to value. The amount of benefits actually received are dependent upon future contingencies, such as the length of time actually worked, early retirement, salary earned at the end of the career, and any changes to the term of the pension plan itself. See *In re Marriage of Ramsey*, 339 Ill. App. 3d 752, 758 (2003).

¶ 27 To address this difficulty, Illinois courts have adopted two methods to divide pensions. Under the total-offset approach, the trial court must determine the actual value of the pension, discount it for the risk that the pension will not vest, and discount it again to present value. *In re Marriage of Peters*, 326 Ill. App. 3d 364, 370 (2001). The trial court then awards the pension to the employee spouse, and awards the other party enough marital property to offset the pension award. *Id.* "This approach is best used when there is sufficient actuarial evidence to determine the present value of the pension, when the employee spouse is close to retirement age, and when there is sufficient marital property to allow an offset." *Robinson v. Robinson*, 146 Ill. App. 3d 474, 476 (1986). The second method is the reserved-jurisdiction method, also known as the

Hunt formula, whereby the trial court reserves jurisdiction to divide the pension and disburse an appropriate percentage to each spouse "if, as and when" the pension becomes payable. See *In re Marriage of Hunt*, 78 Ill. App. 3d 653 (1979). Under this approach, the marital portion of a pension benefit is calculated by dividing the total years of credited service during the marriage by the total years of credited service (the marital interest percentage) and multiplying this fraction by the monthly benefit. *In re Marriage of Richardson*, 381 Ill. App. 3d 47, 52 (2008) (citing *Hunt*, 78 Ill. App. 3d at 663). "This method is best employed where it is difficult to place a present value on a pension due to uncertainties regarding vesting or maturation." *In re Marriage of Mantei*, 222 Ill. App. 3d 933, 937 (1991)

¶ 28 As the petitioner points out, the choice of the method apportioning marital property interest in retirement benefit remains within the discretion of the trial court. *In re Marriage of Wiley*, 199 Ill. App. 3d 169, 177 (1990). The test of proper apportionment is whether it is equitable, and each case rests on its own facts. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 121. An equitable division does not necessarily mean an equal division, and a spouse may be awarded a larger share of the assets if the relevant factors warrant such a result. *In re Marriage of Henke*, 313 Ill. App. 3d 159, 175 (2000). A reviewing court applies the manifest weight of the evidence standard to the trial court's factual findings on each factor, but it applies the abuse of discretion standard in reviewing the trial court's final property distribution. *In re Marriage of Vancura*, 356 Ill. App. 3d 200, 205 (2005).

¶ 29 We note as an initial matter that there was originally some discrepancy as to the amount of member contributions made by respondent. In his motion to reconsider, petitioner argued that the trial court erroneously relied on a value of \$74,760.84 for respondent's refundable contributions. Petitioner goes on to state that the most recent TRS benefit report valued

respondent's refundable contributions at \$130,034.24, and projected her monthly benefit to be \$5,582.42. Our review of the record indicates that it did erroneously include the \$74,760.84 figure in its judgment of dissolution. However, it properly relied upon the \$130,034.24 figure in making its final property distribution. The petitioner conceded error in his motion, acknowledging that the court used the proper figure at trial and in issuing the final judgment of dissolution. It was, in fact, the figure stipulated to by the parties in their pretrial memorandum.

¶ 30 Turning now to the merits, petitioner contends that the court should have chosen a different method for valuing and dividing respondent's pension. That choice is the crux of the trial court's broad discretion in matters concerning the distribution of marital assets, and on the record before us, we cannot say the court abused that discretion in allocating the marital property in the manner it did.

¶ 31 The petitioner cites to a number of cases (*Donley v. Donley*, 83 Ill. App. 3d 367 (1980); *In re Marriage of Hobbs*, 110 Ill. App. 3d 451 (1982); *Sawicki v. Sawicki*, 346 Ill. App. 3d 1107 (2004)), but none are on all fours with the case at bar, nor do they warrant an in-depth discussion. Those cases all state that, in one instance or another, the court would have been better off in applying one of the two approaches of valuing a pension over the other based on the specific facts of that case. That adds nothing to our analysis here.

¶ 32 The thrust of petitioner's argument then becomes that the court did not have the value of his FERS defined benefit plan, and thus the court could not properly divide the property using the total-offset approach. We disagree, and find petitioner's argument somewhat disingenuous.

¶ 33 Testimony at trial elicited the value of respondent's member contributions, her beneficiary refund amount and her projected monthly benefit. There was also evidence of petitioner's TSP and his monthly benefit from his Hartford pension. It is peculiar that petitioner

argued he was entitled to half of respondent's pension, and he would happily allow her to have half of his upon retirement, when he failed to provide either the trial court or respondent with any information whatsoever about the value of his own pension. Petitioner now turns around on appeal to argue there is no way the trial court could have properly divided the pensions without that key information. He cannot have it both ways.

¶ 34 Petitioner relies on *In re Marriage of Mantei*, 222 Ill. App. 3d 933 (1991), for the proposition that a pension's value is not the amount of contributions to the pension. Further reading reveals that is not exactly the conclusion the court reached.

¶ 35 In *Mantei*, petitioner wife appealed the trial court's valuation of the pension. Respondent husband's financial affidavit listed the equity in his retirement fund at \$25,851.61. *Id.* at 935-36. That same dollar amount was listed as its present value. Wife called an expert witness to testify to the value of respondent's pension, who opined that the present cash value of the annuities the respondent would receive upon retirement was \$77,846.73. Based on the current statutory benefits, the expert testified that respondent would begin receiving monthly payments of \$1,636.03. In its memorandum of decision, the trial court accepted the respondent's valuation of the pension (\$25,851.61), but indicated its belief that respondent would get significantly more upon retirement. *Id.* at 936.

¶ 36 In finding that the trial court abused its discretion, the Fourth District held that while the trial court was not necessarily required to accept the wife's expert testimony, it was an abuse of discretion to merely accept respondent's valuation without any testimony to the contrary, particularly when the court indicated that the value of the pension was far greater than respondent husband's contributions. *Id.* at 937-38.

¶ 37 Unlike *Mantei*, the trial court did not arbitrarily choose a number to place on respondent's pension that flew in the face of expert testimony. Neither party presented expert testimony as to the value of respondent's TRS pension. The parties, instead, stipulated to the present value of respondent's member contributions pursuant to the TRS benefit report. That report listed respondent's monthly benefit at \$5,582.42 per month with a retirement age of 59, member contributions of \$130,034.24, and a beneficiary refund of \$247,650.87 in the event respondent chose to take a lump-sum amount as opposed to the annuity over time. Petitioner did not object to these numbers at the hearing and, again, did not provide the value for his own FERS pension. "Parties will be bound by their stipulations unless such stipulations are shown to be unreasonable, the result of fraud or violative of public policy." *In re Marriage of Miller*, 112 Ill. App. 3d 203, 208 (1983); *In re Marriage of Sanborn*, 78 Ill. App. 3d 146 (1979). After agreeing on the value of certain items and failing to introduce evidence to the contrary, petitioner cannot argue now for the first time that there was no evidence of value. *Miller*, 112 Ill. App. 3d at 209.

¶ 38 The trial court also properly exercised its discretion in considering the other factors of section 503. Petitioner's argument that the trial court should have applied a different method of valuing respondent's pension ignores the unique circumstances of this case. Specifically, that if respondent chose to place her pension in pay status, *i.e.*, begin drawing her \$5,582.42 monthly benefit, it would effectively preclude her from any future employment in her field. Respondent testified at trial that she did not plan to draw her retirement now because of the change in her marital status and not knowing what her financial situation would be following the divorce.

¶ 39 While petitioner is a few years older than respondent and thus closer to retirement, he indicated that he had no intention of retiring any time soon. Therefore, under petitioner's idea of an equitable division of marital assets, he would draw half of respondent's monthly benefit while

still contributing to his own various retirement plans and earning a gross income of \$53,000. At the same time, respondent would draw half of her benefit and half of petitioner's unknown FERS once petitioner retires. She would still be paying \$417.58 per month for health insurance and would not have any other source of income. The trial court chose to deny respondent's request for maintenance and contributions to her health insurance premium in lieu of awarding respondent the entirety of her pension. The court found this more appropriate, as it would avoid any future financial entanglements that necessarily arise through a maintenance award. This does not constitute an abuse of discretion, particularly where the appellate court has recognized that the Act, wherever possible, seeks to terminate the financial entanglement of former spouses. *In re Marriage of Lenkner*, 241 Ill. App. 3d 15, 26 (1993) (citing *In re Marriage of Simmons*, 87 Ill. App. 3d 651, 659 (1980)).

¶ 40 While another court may have chosen the reserved jurisdiction method, we cannot say from the record before us that no reasonable person would have applied the total offset approach as adopted by the trial court. See *In re Marriage of Gunn*, 233 Ill. App. 3d 165, 175 (1992). The trial court did not abuse its discretion in valuing respondent's pension or in its final distribution of marital property.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, the judgment of the Rock Island County circuit court is affirmed.

¶ 43 Affirmed.